

IN THE SUPREME COURT OF OHIO

Donald Lee,	:	
	:	
Appellee/Cross-Appellant,	:	Case No. 13-1400
	:	
v.	:	On Appeal from the Morrow County
	:	Court of Appeals, Fifth Appellate District
Village of Cardington, Ohio,	:	
	:	Court of Appeals Case No. 2012 CA 0017
Appellant/Cross-Appellee.	:	

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**APPELLEE/CROSS-APPELLANT DONALD LEE'S  
MEMORANDUM IN SUPPORT OF JURISDICTION ON HIS  
PROPOSITION OF LAW NO. 1 AND MEMORANDUM IN OPPOSITION  
TO APPELLANT/CROSS-APPELLEE'S PROPOSITIONS OF LAW NOS. 1 AND 2**

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**I. STATEMENT AS TO WHY APPELLEE/CROSS-APPELLANT'S PROPOSITION OF LAW IS OF PUBLIC AND GREAT GENERAL INTEREST.**

Contrary to the Appellant Village of Cardington's assertions, the court of appeals' decision did not greatly expand the application of the Ohio Whistleblower statute, O.R.C. §4113.52. For the first time on this appeal, Appellant claims that the Appellee Don Lee is seeking to extend application of the Ohio Whistleblower statute to cover reports and complaints about another party's, other than the employer's, alleged felony criminal and or environmental wrong doing. Appellant mischaracterizes the court of appeals decision as creating new statutory liability for all Ohio employers, especially public employers, for failure to take corrective action concerning another party's alleged felony criminal and/or environmental conduct.

Appellant improperly relies on matters that are outside the record in this case. This action involves the review of the trial court's grant of summary judgment, and Appellant cites to matters that were not before the trial court. Much of the Appellant's argument centers on the fact that the employer cannot control the actions of the local prosecutor. Nowhere is there any evidence that the conduct at issue was presented to the local prosecutor, what decision the prosecutor made, whether the prosecutor considered proceeding, and/or how or why the prosecutor's discretion was involved. Nor is there any evidence in the record of the criminal sanctions levied against the third party, Cardington Yutaka Technologies.

Regardless, Appellant completely misconstrues the court of appeals opinion. The record and opinion are clear that although a local company was dumping a toxic chemical into the waste water treatment system, Appellee Lee reported EPA violations by his employer, the village. Appellee reported that the unknown chemical was killing the bacteria in the Cardington Waste Water Treatment Plant ("WWTP") disrupting the purification process, resulting in the return of contaminated water to the Whetstone Creek, and in turn, the drinking water for downstream

users. In addition, once the glycol was identified, to fail to remove it from the water prior to its return to the creek, was a separate violation by the **village employer**, which was not only criminal, but created an imminent risk of harm. All of the foregoing conduct by the village violated the terms of the village's EPA permit as well as state and federal law. The village was not "cleared" by the Ohio and Federal EPA. Instead, the plant was evaluated before it was known exactly what the cause of the problem was, and it was determined that employee procedures were correct. Regardless if the correct of procedures were in place and were being followed, if the bacteria was dying, the WWTP was malfunctioning and polluting the water. Appellee suffered retaliation as a result of his reports about good faith beliefs of criminal activity by his employer. This is not a case of first impression and the court of appeals did not so indicate. This case fits squarely within the black letter proscriptions of the whistleblower statute.

Appellee/Cross-Appellant, on the other hand, presents a question of public and great general interest concerning the application of this Court's holding in *Leininger v. Pioneer Natl. Latex*, 115 Ohio St.3d 311, 2007-Ohio-4921, 875 N.E. 2d 36 . It affects any employee seeking to bring a wrongful termination in violation of public policy tort claim in addition to a statutory claim based upon some of the same conduct. Appellee's wrongful termination in violation of public policy tort claim is much broader than the whistleblower claim because in addition to the evidence related to the whistleblower claim, it is bolstered by Appellee's reports about the illegal conduct of CYT. The court of appeals relied upon the black letter holding of *Leininger*, stating "[i]t is clear that when a statutory scheme contains a full array of remedies, the underlying public policy will not be jeopardized if a common-law claim for wrongful discharge is not recognized based on that policy." *Id.* at ¶31. The difference in the instant case is that the statutes upon

which the Appellee depends for the sources of the public policy tort claim do not contain remedies to adequately protect society's interest by discouraging wrongful conduct.

In the case at bar, Appellee alleged a multiple source public policy claim. Not only does Appellee allege he was terminated for complaints made to Village officials about violations of the Ohio and federal EPA statutes by his employer, but he also alleges he suffered retaliation for his attempts to work with the various EPA agencies to bring the Waste Water Treatment Plant and CYT into compliance with state and federal statutes and regulations. He further sought enforcement of village local water and sewer ordinances against CYT. As a direct and proximate result of Appellee's reporting of the problems with the sewage treatment plant, his opposition to some of the proposals and projects advanced by the village for rectifying the contaminates that were entering the plant, and his support of the work of the EPA and complaints that the village and/or its administrator were protecting CYT, Appellee was removed from his position. The EPA provisions provide no separate relief provisions for retaliatory terminations, therefore the public policy tort claim lies.

Appellee is entitled to pursue both the whistleblower claim and the wrongful termination in violation of public policy claim. Should the whistleblower claim somehow fail, the wrongful termination tort claim should still lie. It would be unjust to find that the claim under the whistleblower statute fails as a matter of law, while simultaneously precluding the wrongful termination in violation of public policy claim through the improper application of the *Leininger* holding.

## **II. STATEMENT OF THE CASE AND FACTS**

Appellee/Cross-Appellant ("Appellee"), Don Lee, was employed by the Village of Cardington as the Crew Chief from 2000 until his unlawful termination in 2009. His duties

included supervising and overseeing all street maintenance work, sewer maintenance work, and the operation of the water treatment plant and waste water treatment plant (“WWTP”). Lee Affidavit, ¶2, attached to memorandum contra motion for summary judgment, Docket #53 . He supervised nine or ten employees. Ralley, depo. at 12, Docket #52. He has also served as a Township Trustee for nearby Cardington Township since 1996. Lee Aff. ¶4. Part of his duties entailed supervision of the licensed operator of the waste water treatment plant. Lee Aff. ¶3.

**A. Environmental Lawbreaking Was Discovered.**

The WWTP began to experience never before encountered problems. There was an immense amount of frothing of the water and foam double the normal height. Lee Aff. ¶5. Appellee Lee also began to notice that the WWTP was experiencing a problem with the bacteria used to treat the raw sewage dying; this could cause the foaming. This was occurring two times a year and was coinciding with the July and Christmas holiday shut downs of the Cardington Yutaka Technologies (“CYT”) plant. Upon further investigation, it appeared the plant was receiving a toxic material in the waste water at the time of the CYT plant shutdowns. Lee Aff. ¶6. Ralley depo. at 16. The bacteria are the lifeblood of the sewage breakdown operation; various forms of bacteria “eat” the sewage. That it was dying was a very significant problem.

CYT is a manufacturer of car parts for Honda. CYT is the village’s largest employer, employing between 600-800 people during the relevant time periods of the instant case. Ralley depo. at 17; Wise depo. at 8; Docket #50.

**B. Appellee Reported The Problem To The EPA, Requested Assistance, And Started Getting Pushback From The Village Administrator.**

Appellee was in regular contact with the EPA to try to identify and rectify the problems observed in the WWTP. Mike Sapp was the Ohio EPA representative assigned to the Village of Cardington district. Lee Aff. ¶7; Ralley depo. at 25. By 2007, the problems had become worse.

The sludge which is the by product or final product of the WWTP process was contaminated and could no longer be used for agricultural purposes. Appellee had a permit with the EPA which permitted the Village to haul the sludge to his farm where he spread it for use as fertilizer. Lee Aff. ¶8.

Once Appellee determined that the sludge was contaminated and that no plant life would grow in it, he informed the Village Administrator, Dan Ralley, that he could no longer accept the sludge for his farm so the Village would have to find an alternative dumping site, most likely a landfill which would cost additional money. Instead, Mr. Ralley wanted to ignore the problem and insisted that Appellee try to find another unsuspecting farmer who would be willing to take the sludge. Appellee refused, much to the chagrin of Mr. Ralley, and ultimately the sludge was taken to a landfill. This problem which Mr. Ralley would have preferred to ignore cost additional money. Lee Aff. ¶9; Lee depo. at 36, Docket #36; Ralley depo. at 39. The cost was approximately \$7,000-\$7,500 for each trip to the landfill. Ralley depo. at 45.

The WWTP operator, Mike Chapman, and Appellee requested help from the EPA in resolving the problem. Mike Sapp and two other EPA employees came to the plant, spent two days evaluating the operation of the plant, procedures, and processes and declared that he “wished all of our wastewater treatment plants were being run with this type of operation.” In other words, there were no problems with the procedures being utilized by the Village of Cardington WWTP employees. Lee Aff. ¶10; Ralley depo. at 40.

Next, the EPA and village officials visited other commercial or industrial sites to eliminate those businesses as sources of the problem with the contaminant. Ultimately, by late 2007, it appeared that CYT was placing the contaminant into the waste water which was finding its way into the WWTP. For CYT to place any kind of industrial waste product in the water, it

was an EPA violation. Lee Aff. ¶11. It also needed a permit for any type of pretreatment or disposal for waste water, which it did not have. Ralley depo. at 31. Appellee informed Mr. Ralley of this situation. Lee Aff. ¶11.

In order to try to ascertain whether the problem material was coming from the CYT plant and its nature, Appellee and his subordinates drew samples from a sewer line near CYT. They drew samples on four different occasions. On two of those sampling visits, they were spotted by CYT employees and pumps in the plant were shut down so their efforts at obtaining samples failed. However, on another occasion, Mr. Barlow obtained a successful sample which was sent to a lab in Colorado. The lab identified the compound as glycol which is a product used by CYT in its leak inspection tanks. Lee Aff. ¶12.

Appellee, Mike Sapp, Mike Chapman, and Jason Hursey (WWTP plant employee) made an unannounced visit to CYT. About three months later, federal EPA officials decided on another follow-up unannounced visit to the CYT plant in April, 2008. Unfortunately, Dan Ralley caused CYT management to become aware about the impending visit so much of the purpose of the investigatory inspection was thwarted. During the visits large tanks were observed in which CYT submerged automotive parts, and blew air into those parts to check for leaks. The tanks contained industrial chemicals including glycol. Lee Aff. ¶13; Ralley depo. at 34.

Subsequently, state EPA official Mike Sapp and federal EPA official Dave Barlow told the Appellee that they did not trust Mr. Ralley and instructed Appellee not to share EPA plans for their investigation with Mr. Ralley. Lee Aff. ¶14.

**C. Appellee Reported Problems To Mr. Ralley; He's Uncooperative.**

Appellee reported problems with the WWTP as a result of the illegal dumping to Mr. Ralley on numerous occasions. Often times he was uncooperative or resisted Appellee's efforts to fully inform him of the problems. Mr. Ralley threatened Mike Chapman and the Appellee by telling them that if employees of CYT lost their jobs as a result of this unauthorized industrial dumping, that so would they. Lee Aff. ¶15.

Mr. Ralley also discouraged Appellee's efforts to present the problems with the WWTP to the village council. At times he threatened Appellee's job if he went over his head and discussed the problems with members of village council. At one time in late 2008 or early 2009, he said he would let Mr. Chapman and the Appellee alternate months attending meetings and reporting to council but then he changed his mind and would not permit it. Although council was generally aware of some of the problems at the plant, Village council member Randal Fox testified that Mr. Ralley never mentioned to council that CYT was the source of the discharge. Fox depo. at 30, Docket #50.

Another example of Mr. Ralley's obstructionist behavior can be found in the ordering of a sampling device. Mr. Chapman, Mr. Ralley, and Appellee agreed that the village needed to purchase a sampling machine to be placed in the well at CYT to help identify the source and nature of the problem. Mr. Chapman and Appellee found a device that would physically fit in the well and accomplish the objectives. Unfortunately, Mr. Ralley ordered a completely different machine along with a training course, but the machine would not fit in the well. Appellee suggested he and Mr. Chapman complete the training process because it might instruct them as to how they could make the instrument fit into the well. They were not permitted to do the training nor was the equipment ever exchanged. Lee Aff. ¶17.

**D. Appellee Reported Violations To Village Council.**

On September 15, 2008 Appellee was permitted to attend the village council meeting to inform them of WWTP pump and other problems. The contaminant was causing a deterioration in the propellers of the pumps. He informed the council that the Village had a material coming into the plant that was killing the WWTP bacteria and as a result the village was also sending toxic water downstream. In addition glycol was being returned to the Whetstone Creek. Appellee explained that glycol is not to be put into waste water treatment systems, because if it is not removed, and therefore if it is going back into the Whetstone Creek, it will be in the drinking water that is used downstream by half a million people. While this did not violate the permit extant at the time because the permit was silent as to glycol, it was nevertheless an EPA violation by the village because a the chemical entering the drinking water had been identified as toxic. Also since EPA was then aware of glycol in the WWTP stream, Appellee told the council that the village could have trouble renewing their EPA permit which would cause the EPA to take control of operation of the plant. The glycol container label even instructs that it is not to be placed in a waste water system. To the Appellee's surprise, no one on council asked any questions, requested further elaboration, nor asked for nor indicated any sort of follow up activity was necessary based upon what he had told them. Lee Aff. ¶18.

Despite their silence at the council meeting, village council members knew and were aware that the village's WWTP permit, set forth the appropriate limits for materials, chemicals, and compounds discharged into the Whetstone Creek. They knew that if the levels of discharges exceeded the specifications of the permit, that the village could be liable for EPA violations. Garner depo. at 27; Fox depo. at 27; Graham depo. at 30, 31, Docket #50.

Appellee further indicated to village council and Mr. Ralley that he did not agree with some aspects of the engineering reports and estimates to repair the plant. He indicated that some of the items were a waste of taxpayer money and could be accomplished much more cheaply. Mr. Ralley wanted to completely turn the solution to the problems with the WWTP over to an engineering firm which was proposing a project that cost at least \$800,000. Appellee suggested to council that the village could work in steps to accomplish the repairs one at a time which would satisfy the EPA, save taxpayer money, and achieve a better product in the end. Appellee suggested that the village not bury itself in debt and that there were much cheaper alternatives to the engineering proposals. For example, Mr. Chapman and Appellee believed that a change in the grinding and sorting process at the head of the plant could improve the flow and that could be done for just \$100,000.00. In addition, the engineering firm wanted over \$100,000.00 to install equipment to deal with phosphorous removal. Appellee and Mr. Chapman developed a chemical process which removed the phosphorous with a cost to the village of less than \$10,000.00. Mr. Ralley was reluctant to report this achievement to the council. Lee Aff. ¶19.

Another example is Appellee disagreed with an engineering proposal to increase the diameter of the inflow pipe to the plant because it failed to account for the smaller diameter pipe that would have still been encased in concrete inside the plant, and it failed to account for the fact that the sewage would sit in the larger pipe without starting treatment which would also frustrate the specially designed bacteria in the plant. Appellee Lee also suggested a well-known reservoir method could have been used to control the inflow problems and to deal with excess storm water which causes overflows. Lee Aff. ¶19.

Dan Ralley admitted that Appellee talked to him a lot regarding the water problems in the WWTP. Ralley depo. at 80. Mr. Lee also mentioned that the village should be dealing less with

engineers and more with maintaining and repairing the plant. *Id.* at 115. He characterized it as tension between what the engineers proposed and a simpler solution. *Id.* at 56. Appellee said some of the problems could be resolved in a cheaper fashion. *Id.* Mr. Ralley stated that Appellee had told him how very concerned he was about the quality of the water going into the Whetstone Creek. Ralley depo. at 70.

Members of village council admitted they were aware of the disagreements between Appellee Lee and Mr. Ralley related to plant repair issues. Council member Fox was aware that Mr. Chapman and Appellee had solved part of the problem in the WWTP in a different way than the engineers proposed. He further knew that Appellee had evaluated the engineering figures and thought they were inflated. In fact Mr. Fox thought another engineering firm should be consulted regarding an estimate. Fox depo. at 47-52. Council member Garner admitted he was aware that Appellee disagreed with some of the budgetary numbers related to the WWTP proposed by Mr. Ralley which were based upon the engineering firm's estimates. Similarly, he remembered that Don Lee expressed a number of ideas that would work to fix the WWTP and that Mr. Ralley disagreed with those notions. Garner depo. at 18-20. Finally, Ms. Graham testified that Don Lee was upset about the disruption that had been caused in the publicly owned WWTP and that someone should pay. Graham depo. at 41.

Appellee reported other violations of the law involving CYT to Mr. Ralley. The village of Cardington has an ordinance that limits any one user of water to a total of five percent of the total average of the village's water production. Appellee informed Mr. Ralley that CYT was probably exceeding the limits established by the ordinance, and that this would have been another way to try to limit the quantity of glycol being placed into the WWTP. He urged Mr.

Ralley to enforce the ordinance but no further action was taken. Lee Aff. ¶20. Ralley depo. at 116.

On another occasion, Appellee informed Mr. Ralley that he suspected that CYT was using a separate well as a source of fresh water. This also violates the village ordinances because it allows for waste water to be placed into the sewer system without CYT paying for the sewer service. This is true because the sewer bills are generated based upon the amount of metered fresh water consumed by the user. Lee Aff. ¶21. Ralley depo. at 52.

**E. Appellee's Written Report Summarized The Problems.**

Shortly before Appellee's termination, at the suggestion of Mr. Barlow, Appellee provided a written supervisor's report to Mr. Ralley. Mr. Barlow thought that village council could use the report as a tool to seek reimbursement from CYT. To Appellee's knowledge this written report was never provided to council. This document was a summary of Appellee's analysis of his observations of the problems in the WWTP. It also set forth the specific equipment failures/damage that had occurred as a result of the dying bacteria caused by the illegal placement of glycol in the waste water. Appellee characterized the problem as the village had lost part of the life of its plant. For example the pumps were damaged by this glycol because it changed the consistency of the sewage material pumped. Appellee further outlined what equipment needed to be repaired/replaced in order to keep the village operating within the parameters of its permit which would alleviate present and prevent future EPA violations. Lee Aff. ¶22.

**F. Appellee's Termination Was Retaliatory.**

In late April 27, 2009, Mr. Ralley called the Appellee and told him he needed to have a private meeting. Appellee agreed to meet later at Mr. Lee's office at the water treatment plant.

Mr. Ralley arrived accompanied by village council member Fox. Mr. Ralley stated he had one of the most difficult things to do that he ever had done. He told the Appellee he was being placed on two weeks administrative paid leave, and then he was to resign his employment. When Appellee asked why, Mr. Ralley responded that he did not have to give a reason. Appellee then inquired of Mr. Fox who responded that he did not have a clue what Mr. Ralley was doing or why. Mr. Ralley told the Appellee that if he did not resign, he would fire him. Lee Aff. ¶23. Appellee did not resign, was placed on leave, and was terminated approximately two months later.

At no time was Appellee ever warned that his job performance was deficient in any way. Ralley depo. at 98. He was not criticized nor informed that there were concerns with projects not being done or completed on time. He was not counseled related to his job performance. Ralley depo. at 87.

#### **RESPONSE TO APPELLANT'S PROPOSITION OF LAW NO. 1**

#### **This Action Falls Squarely Within The Protection Afforded By O.R.C. §4113.52(A) Because Appellee Was Reporting Criminal Activity By His Employer.**

Throughout the course of this litigation Appellant adopted and abandoned several overly restrictive interpretations of the whistleblower statute, O.R.C. §4113.52(A). For example, at one time Appellant incorrectly argued that Appellee was not entitled to protection because he never made a report to an outside agency. While belied by the actual facts of this case, such an interpretation is wrong. Appellant also incorrectly claimed that the reported violation can only be something that can be corrected within twenty four hours.

Now for the first time on the appeal to this Court, Appellant claims that the Fifth District Court of Appeals applied the whistleblower statute to criminal actions by third parties which the employer either failed to address, and or did not have the ability to address. Such an assertion

completely mischaracterizes the evidence in this action. While Appellee contends that under certain circumstances that the statute could be so applied, Appellee primarily alleged and argued that he was discharged in retaliation for his reports of criminal activity by the **Village of Cardington** rather than Cardington Yutaka Technologies (CYT). The Court of Appeals so held.

Appellant confuses and compresses together at least three separate overlapping sets of events that drew CYT into this action. First, Appellee, the village, and the EPA needed to identify what chemical was invading the WWTP, and its origin in order to address and rectify the problems that were occurring within the WWTP, and correct the problems in the water being returned to the Whetstone Creek. CYT was a logical suspect so much of the testing and investigation focused on it. Second, Appellee believed that the village and Dan Ralley were shielding CYT for obvious economic reasons. If the problems in the plant were acknowledged and addressed, it could ultimately be an admission that CYT was involved in illegal environmental dumping. Third, Appellee was encouraging the village to use its enforcement powers to curb CYT's practices which might ameliorate, at least to some degree, the problems that were occurring in the WWTP. Thus the Appellant village would have the entire focus of Appellee's complaints/reports be on CYT, which is not what the evidence showed.

Contrary to the assertions of the Appellant, the court of appeals found that Appellee repeatedly complained about conduct by his employer that was a criminal offense and a violation of state and federal law that was likely to cause an imminent risk of physical harm to persons or a hazard to public health or safety. After Appellee and the EPA ultimately discovered the type of toxic chemical and its source, Appellee reported to his employer that CYT was discharging glycol into the WWTP. Appellee indicated that not only was the glycol not being filtered out of the water and was being returned to the Whetstone Creek **by the village** where it would become

a hazard to the drinking water for all users situated below the plant (a criminal violation by the village), but also the glycol was upsetting the operation of the WWTP. The glycol upset the bacteria balance in the plant causing it to die which changed the consistency of the effluent material which in turn damaged the pumps and other equipment. This put the proper operation of the WWTP at risk and not only jeopardized the village's EPA permit but threatened to cause **the village to violate its permit** which exposed the **village and/or its officials** to criminal liability.

The village of Cardington's permit was governed by O.R.C. Chapters 3745, and 6111 and specifically the provisions of O.R.C. §6111.60 and O.A.C. §§3745-33 and/or 3745-38. O.R.C. §6111.04(C) prohibits a permit holder from discharging sewage in excess of the permissive discharges authorized under an existing permit into the waters of the state without permission from the director. The permit issued by the EPA also specifies the levels of the various compounds, chemicals, or elements which are permitted to be in the water that is returned to the state's water supply following treatment. If those levels are exceeding the mandates of the permit, of course, the village is violating the law. Section 6111.99 states that violators of section 6111.04 are subject to a \$25,000.00 fine and/or imprisonment for up to one year. Furthermore, O.R.C. §2927.24(B)(1) makes it unlawful to knowingly place a hazardous chemical or harmful substance in a public water supply. This statute provides for criminal penalties. All deposed village council members admitted that it was illegal to discharge water with chemical content exceeding the limits set by the EPA permit.

Consequently there can be no question that Appellant was complaining of criminal conduct by the Village. The Court of Appeals found that Appellee was complaining of violations of the law by the Village. *Lee v. Cardington*, 5<sup>th</sup> Dist. Morrow No. 12CA0017, 2013-

Ohio-3108 ¶¶21-25. In only one sentence does the Court also state "...we find the Village has the authority to correct the alleged illegal activity of CYT, even if the Village was not directly involved in the criminal activity" which is also a correct reading of the statute. *Id.*, ¶26. O.R.C. §4113.52(A) specifically provides for these types of reports of criminal activity stating that: "[i]f an employee becomes aware in the course of the employee's employment of a violation of any state or federal statute . . . that the employee's **employer has authority to correct . . .**" then the employee can report it to the employer. (emphasis added). In this situation the Village did have enforcement powers that it could have utilized.

Appellant misreads the statute placing the foundation of its argument on the notion the Village supposedly had a mandatory statutory duty to take corrective action within 24 hours. The village bootstraps onto that notion the argument that the prosecutor had discretion and normally could not decide whether or not to pursue prosecution that quickly, and the prosecutor's decision to defer to the Ohio EPA and Federal EPA. The problem with this argument is that not only is evidence related to the prosecutor not in the record, nor referenced, raised or even so much as mentioned in the courts below, it is irrelevant since Appellee presented ample evidence of wrongdoing by his employer. Appellee recalls no statement by the Court of Appeals that this case involves an issue of first impression. The opinion is silent. Nor did it appear the judges were "wrestling with whether the authority to correct the violation within 24 hours applied solely to the Village's own behavior or, alternatively the conduct of third parties." The opinion is silent on this as well. Appellant is grasping at straws to try to make it appear this is an unprecedented case. While the facts of every case are unique, the whistleblower issues at bar are not.

The whistleblower statute is designed to protect individuals who report illegal activity by their employer or conduct that the employer has the ability to correct. Appellant implies that it would be liable if it did not correct the problem or indicate how it intends to address the problem within twenty four hours. Instead, if the employer chooses not to respond to the problem within twenty four hours, the employee can proceed to report the criminal activity to an outside entity. Even then the employer is not necessarily liable. Appellant omits that the employer faces no liability until it takes some form of retaliatory action based upon the whistleblowing. So long as the employer does not retaliate against the employee, whether or not the employer or its prosecutor took action within twenty four hours is of no actionable concern.

The Court of Appeals also correctly recognized that the Appellant Village's reliance on the hearsay statements made by Mr. Barlow of the federal EPA are not dispositive. Mr. Barlow merely commented that the procedures being used in the plant, before the discovery of the nature of the contaminant (glycol) were proper and were not causing the malfunctions. In other words, Village employees were not making any mistakes and were carrying out their duties correctly. That did not mean the village was not violating the law. However once the glycol was later identified, and the EPA and Appellee Lee realized that the chemical was not being removed from the water returned to the Whetstone Creek, and that the chemical was altering the levels of various other substances present in the "clean" water returned to the creek, environmental criminal violations which the Village had the duty and ability to correct were confirmed. Regardless of whether the EPA made any threats, Appellee was pointing out that the village was violating the terms of its permit, which could lead not only to criminal penalties but put the permit in jeopardy as well.

Appellee did report the alleged criminal violations to the village council and to Dan Ralley, the village administrator. Appellant's statements to the contrary are incorrect. Even the portion of the Court of Appeals decision quoted by the Appellant reveals Appellee was complaining of criminal conduct. In paragraph 7 the court acknowledges: "[h]e informed the council the Village had a material coming into the plant killing the bacteria, and as a result **toxic water was potentially being sent down stream.**" (emphasis added). This is a criminal violation as the village was violating both its permit provisions, and O.R.C. §2927.24(B)(1) which makes it unlawful to knowingly place a hazardous chemical or harmful substance in a public water supply. The defense outlined in the statute and relied upon by the Appellant does not apply. O.R.C. §2927.24(B)(1) carves out an exception only if the contaminant is disposed of as waste into a household drain, and subsequently into the waste water system. In the instant matter, the contaminants were going into the drinking water. The Village was placing water that was not treated in accordance with its permit, contained improper substances on account of the manner in which the glycol destroyed the system, and which contained the known contaminant, glycol, into the creek which flowed downstream into waters which were used for drinking by the city of Columbus among other entities. It is hard to imagine a more imminent threat to the health and safety of the public.

The evidence in this action reveals the written report to Mr. Ralley also referred to criminal matters as required by the statute. Appellant erroneously believes that Appellee's deposition indicates to the contrary. Throughout this action, Appellant relied on Appellee's deposition testimony which was incomplete, disjointed, and out of chronological order. Appellant would have this Court ignore Appellee's affidavit testimony which is not contradicted by his deposition transcript.

Shortly before Appellee's termination, at the suggestion of Mr. Barlow, Appellee provided a written supervisor's report to Mr. Ralley. Mr. Barlow thought that village council could use the report as a tool to seek reimbursement from CYT. To Appellee's knowledge this written report was never provided to council. This document was a summary of Appellee's analysis of his observations of the problems in the WWTP. It also set forth the specific equipment failures/damage that had occurred as a result of the dying bacteria caused by the illegal placement of glycol in the waste water. Appellee characterized the problem as the village had lost part of the life of its plant. For example the pumps were damaged by this glycol because it changed the consistency of the sewage material pumped. Appellee further outlined what equipment needed to be repaired/replaced in order to keep the village operating within the parameters of its permit to alleviate and prevent EPA violations. Diffusers needed to be replaced, and the village had decaying in the concrete walls caused by the glycol. Appellee also suggested the procedure for the repairs such as how to bypass various parts of the plant as it was being repaired without disrupting the treatment process. Lee Aff. ¶22.

This action involves good faith reports of potential environmental criminal conduct by Appellee's employer, not a third party. While the whistleblower statute may cover retaliation on account of some of Appellee's complaints about CYT, much of that evidence relates to the wrongful termination in violation of public policy tort claim, as will be seen below.

## **RESPONSE TO APPELLANT'S PROPOSITION OF LAW NO. 2**

**The Court of Appeals Correctly Found That Appellee Had A Claim Pursuant To The Protection Afforded By O.R.C. §4113.52(A)(2) Because Appellee Was Not Required To File A Report Of Criminal Activity With His Employer Related To Environmental Illegal Conduct.**

The evidence is also uncontradicted that Appellee reported his concerns with CYT and the WWTP to Ohio and federal EPA officials and was cooperating with those agencies. In cases

involving criminal violations of air and water pollution laws, there is no need to file an initial report with the employer before reporting the conduct to enforcement authorities. The report to the agency need not be in writing either. Oral disclosures provide for protection under the statute and the employer may not retaliate against the employee on account of those direct oral reports. Appellant Village is incorrect when it states that Appellee did not report his concerns about the problems with the operation of the Waste Water Treatment Plant to the EPA. As paragraphs 7, 10, 11, 13, and 18 of Appellee's affidavit describe, Appellee was in constant contact with Mike Sapp of the Ohio EPA. Mr. Sapp was often at the plant. Appellee wrote his report to Mr. Ralley at the urging of Mr. Barlow of the federal EPA. ¶22, affidavit of Appellee. So Appellee had complained to Mr. Barlow as well.

O.R.C. §4113.52(A)(2) provides:

(2) If an employee becomes aware in the course of the employee's employment of a violation of chapter 3704., 3734., 6109., or 6111. of the Revised Code that is a criminal offense, the employee directly may notify, either orally or in writing, any appropriate public official or agency that has regulatory authority over the employer and the industry, trade, or business in which the employer is engaged.

O.R.C. §6111.04(C) prohibits a permit holder from discharging sewage in excess of the permissive discharges authorized under an existing permit into the waters of the state without permission from the director. Section 6111.60 governs the issuance of the village's WWTP NPDES permit. Finally, section 6111.99 states that violators of section 6111.04 are subject to a \$25,000.00 fine and/or imprisonment for up to one year. Plaintiff reported environmental criminal wrongdoing to both the state and federal EPA, and suffered retaliation as a result.

## APPELLEE/CROSS-APPELLANT'S PROPOSITION OF LAW NO. 1

### The Court Below Erred By Finding That Appellee/Cross-Appellant Failed To Satisfy The Jeopardy Element Of His Tort Claim For Wrongful Termination In Violation Of Public Policy.

This Court in *Painter v. Graley*, 70 Ohio St.3d 377, 639 N.E. 2d 51 (1994), set forth the four elements that Appellee/Cross-Appellant (“Appellee”) must prove to establish his wrongful discharge in violation of public policy claim. Appellee properly alleged and developed evidence to satisfy all four elements of this claim. Appellee can show:

1. That clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulations, or in the common law (the *clarity* element).
2. That dismissing employees under circumstances like those involved in the plaintiff’s dismissal would jeopardize the public policy (the *jeopardy* element).
3. The plaintiff’s dismissal was motivated by conduct related to the public policy (the *causation* element).
4. The employer lacked overriding legitimate business justification for the dismissal (the *overriding justification* element).

The first two elements, “clarity” and “jeopardy” are questions of law.

#### **A. Appellee Lee Satisfies The Clarity Element.**

As stated in Appellee’s Complaint a clear public policy existed manifested in federal and state statutes, the Code of Federal Regulations, and the Ohio Administrative Code. The action about which Appellee complained and tirelessly worked to correct also violated the village ordinances of Cardington. Appellee’s wrongful termination in violation of public policy tort claim is considerably broader than the whistleblower claim. Appellee suffered retaliation on account of not only complaining about the activities set forth above under the whistleblowing provisions but also his work to eliminate various forms of pollution, and his efforts to efficiently

maintain and repair the WWTP. Appellee also sought to obtain compliance with various laws and ordinances by both the village and CYT. As the evidence in this case shows, Appellee Lee became aware of a toxic substance entering the Cardington Waste Water Treatment Plant, later identified to be glycol. This compound destroyed some of the effluent eating bacteria in the plant and altered the consistency of the effluent the pumps were designed to move. Not only was the placing of the glycol into the waste water system illegal, but it also threatened to alter the end water product which was being returned to the Whetstone Creek which could have violated the law by exceeding the requirements of the village's EPA permit.

As stated above, the village of Cardington's permit was governed by O.R.C. Chapter 3745 and specifically the provisions of O.A.C. §§3745-33 and/or 3745-38, and Chapter 6111. The permit issued by the EPA specifies the levels of the various compounds, chemicals, or elements which are permitted to be in the water that is returned the state's water supply following treatment. If those levels exceed the mandates of the permit, of course, the village is violating the law.

The waste water treatment plant was constructed and operated pursuant to the mandates prescribed in Chapters 6111, 6117, and/or 6119 of the Ohio Revised Code. If the plant was not operating properly, as reported by Appellee, then the Ohio Revised Code was not being properly adhered to. The federal law governing the acceptable limits for material returned to the nation's waterways can be found at 33 U.S.C. §1251 *et seq.* WWTP permits and licenses are governed by 33 U.S.C. §1341 *et seq.*

Ohio Administrative Code §3745-3-04 states that industrial users shall not introduce pollutants into waste water treatment systems and that permits are required for the discharge of industrial wastes. O.A.C. §3745-33-02. Appellee repeatedly pointed out that not only was the

Village possibly violating its permit requirements and the law by returning contaminated water to the creek, but that CYT was violating the law as well. The village needed to take action not only to correct its own actions but to enforce its own ordinances as they related to CYT's illegal conduct. As stated, the village's permit was controlled by §6111.04(C).

The Village of Cardington ordinances were being violated by CYT and Appellee also was pointing that out hoping for enforcement action. §921.06(a)(4) of the Codified Ordinances of the Village of Cardington prohibits any discharges of wastes that injure or interfere with any wastewater treatment process. §921.06(a)(3) limits the maximum discharge to 25,000 gallons per day or no more than 5 percent of the average daily flow of the receiving wastewater treatment facility. §921.05(d) prohibits any water user from connecting to another or private water source apart from the Village of Cardington without express permission from the Waste Water Supervisor. Last, the discharge of glycol into the sewer system by CYT was violating §§925.02 and 925.03. §925.04 provided the village with monitoring and inspection authority if it believed a user was violating village ordinances.

The conduct that Appellee complained about violated the aforementioned statutes, regulations, and ordinances, and the public policy embodied and expressed by those laws. Appellee's disagreements and assertions related to equipment repairs, maintenance, and replacement were all designed to bring the WWTP into compliance. Appellee also addressed the conduct of CYT which was causing the illegal problems in the WWTP. Appellee suffered retaliation on account of his attempts to bring the village into compliance with its permit requirements and to prevent any illegal operation of the WWTP, as well as his attempts to get the village to take action to enforce its ordinances against CYT, which the village was obviously

trying to protect on account of its economic value to the village. The village had the power to enforce its ordinances; Appellee was urging it to do so.

**B. Appellee Established The Jeopardy Element.**

The Court of Appeals' reliance on *Leininger v. Pioneer Natl. Latex*, 115 Ohio St.3d 311, 2007-Ohio-4921, 875 N.E. 2d 36, and its prodigy is misplaced. *Leininger* presented a different set of facts than the instant case. There, this Court held that public policy claims are not permitted where the statute that is the basis of the public policy provides remedies that adequately protect the societal interest even if the statute "provides less than a fully panoply of relief." *Id.* *Leininger* involved a common-law tort claim for wrongful discharge based upon the public policy against age discrimination. This Court held such a claim does not exist because the remedies in O.R.C. Chapter 4112 provide complete relief for claims of age discrimination in employment. In other words, the public policy tort claim was unnecessary because the age discrimination statutes provided a full remedy. There was no need to piggyback a nearly identical wrongful termination tort claim on top of what really was an age discrimination claim with its own set of remedies.

In the case at bar, Appellee alleged a multiple source public policy claim. Not only does Appellee allege he was terminated for complaints made to Village officials about violations of the Ohio and federal EPA statutes, but he also alleges he suffered retaliation for his attempts to work with the various EPA agencies to bring the Waste Water Treatment Plant into compliance with state and federal statutes and regulations. See paragraphs 5-13 of Appellee's complaint. He also sought enforcement of Village water and sewer ordinances against CYT. As a direct and proximate result of Appellee's reporting the problems with the sewage treatment plant, his opposition to some of the proposals and projects advanced by the village for rectifying the

contaminates that were entering the plant, and his support of the work of the EPA, Appellee was removed from his position. The EPA provisions provide no separate relief provisions for retaliatory terminations, therefore the public policy tort claim lies.

This Court explained the history of its holdings in *Leininger*:

In *Greeley*, the statute involved did not provide any private remedies to the employee, and so a claim at common law was recognized. 49 Ohio St.3d 228, 551 N.E.2d 981. In contrast, a common-law claim was not recognized in a case in which the appellee had sufficiently broad and inclusive remedies through statutes and regulations governing public employment as well as a collective bargaining agreement with grievance procedures. *Provens v. Stark Cty. Bd. of Mental Retardation & Developmental Disabilities* (1992), 64 Ohio St.3d 252, 1992 Ohio 35, 594 N.E.2d 959.

When public policy arises from more than one source, the analysis has been different. In *Collins*, the terminated employee's wrongful discharge claim was based on the public policy against sexual harassment and sex discrimination, and two sources for the public policy were implicated, R.C. Chapters 2907 and 4112. "In cases of multiple-source public policy, the statute containing the right and remedy will not foreclose recognition of the tort on the basis of some other source of public policy, unless it was the legislature's intent in enacting the statute to preempt common-law remedies." (Emphasis sic). *Collins*, 73 Ohio St.3d at 73, 652 N.E.2d 653. This court cautioned, however, "We do not mean to suggest that where a statute's coverage provisions form an essential part of its public policy, we may extract a policy from the statute and use it to nullify the statute's own coverage provisions." *Id.* at 74. *Collins* was precluded from pursuing the remedies available in R.C. Chapter 4112 because her employer did not employ a sufficient number of persons to be covered by the chapter. *Id.* We declined to decide the issue of whether the availability of statutory remedies should defeat a wrongful discharge claim. *Id.*

*Id.*, 115 Ohio St.3d at 315.

Continuing, the *Leininger* Court discussed the continuing viability of its holding in *Kulch v. Structural Fibers*, 74 Ohio St.3d 134, 677 N.E. 2d 308 (1997). *Kulch* involved a case in which there were **multiple sources** indicating a public policy against the type of wrongful termination alleged. *Leininger*, 115 Ohio St.3d at 316. *Kulch* alleged that he had been terminated for filing a complaint with the Occupational Safety and Health Administration (OSHA). Both 29 U.S.C.

§660(c) and O.R.C. §4113.52 were identified as separate and independent sources for the public policy against termination for whistleblowing. *Id.* After noting that the federal statute did not provide an employee with a private cause of action against his employer, this Court determined that the remedies available under O.R.C. §4113.52 were not adequate to fully compensate an aggrieved employee. *Id.*

On the other hand, in *Wiles v. Medina Auto Parts*, 96 Ohio St.3d 240, 2002-Ohio-3994, 773 N.E. 2d 526, this Court determined that there was no need to allow a wrongful discharge claim based on the public policy expressed in the Family and Medical Leave Act because the act contained a sufficient remedy even if it did not provide for punitive damages. *Wiles*, 96 Ohio St.3d 17. As required in the instant case, this Court stated that “[a]n analysis of the jeopardy element necessarily involves inquiring into the existence of an alternative means of promoting the particular public policy to be vindicated by a common-law wrongful discharge claim.” *Id.* at 15. Where the statutes relied upon do not contain remedy provisions as an essential part of the statutes, a public policy claim can be recognized to protect society’s interests by discouraging the wrongful conduct. *Leininger*, 115 Ohio St.3d at 316-317.

Importantly, this Court explained in *Kulch* why in some circumstances it is necessary to recognize a separate public policy tort in addition to the Whistleblower Statute Claim. As stated by this Court, the public policy embodied in the Whistle Blower statute is limited. *Id.*, 78 Ohio St. 3d at 153. “By imposing strict and detailed requirements on certain whistleblowers and restricting the statute’s applicability to a narrow set of circumstances, the legislature intended to encourage whistleblowing only to the extent that the employee complies with the dictates of R.C. 4113.52. \* \* \* Failure to do so prevents the employee from claiming the protections embodied in the statute.” *Id.* *Kulch* holds that an employee may proceed both on a public policy tort and

Whistleblower Statute claim and the remedies are cumulative; the employee is not entitled to double damages. *Id.* at 162.

Similar to the aforementioned issues mentioned in *Kulch*, Appellant/Cross Appellee's first argument in its motion for summary judgment was that Appellee failed to comply with the requirements of providing oral and written notice to the employer of his claims of alleged violations. If, for some reason, the Whistleblower Statute does not even apply, Appellee, for the foregoing reasons, is entitled to pursue the wrongful termination in violation of public policy claim. Even if the Whistleblower Statute does apply, Appellee's claims under that statute, as set forth above, are narrower so he should also be able to pursue the broader public policy tort claims.

The fallacy in the Courts' below interpretation of *Leininger* as it relates to the jeopardy element is best illustrated by this Court's opinion in *Sutton v. Tomco*, 129 Ohio St. 3d 153, 2011-Ohio-2723, 950 N.E.2d 938. In *Tomco* the issue under the jeopardy analysis was whether a retaliatory dismissal of an employee injured on the job, but who has not yet filed, instituted, or pursued a Workers' Compensation Claim jeopardizes the public policy against retaliatory employment actions as expressed in O.R.C. §4123.90. In cases where the right and remedy are part of the same statute that is the sole source of the public policy opposing the discharge, the test for determining the jeopardy element is whether the remedy provisions adequately protect society's interest by discouraging the wrongful conduct. *Id.*, 129 Ohio St. 3d at 161. Therefore, the test was whether §4123.90 provided adequate remedies to protect the public interest against retaliatory firings. *Id.*

The remedy section begins with "[a]ny such employee may file an action in the common pleas court ..." This Court held:

The phrase “[a]ny such employee” is a limitation of the class of people that can avail itself of the remedies set out in R.C. 4123.90. By its express terms, R.C. 4123.90 does not apply to Sutton or others who experience retaliatory employment action after being injured but before they file, institute, or pursue a workers’ compensation claim. Consequently, a claim for retaliatory discharge in those circumstances is not cognizable under the statute. It is precisely this reason that Sutton’s statutory claim failed. Therefore R.C. 4123.90 plainly does nothing to discourage the wrongful conduct Sutton alleges. Accordingly we hold that R.C. 4123.90 does not provide adequate remedies, and thus the jeopardy element is satisfied.

*Id.* Similarly, in the instant case, at a minimum, if Appellee is precluded by the operation of the Whistleblower statute from pursuing his claims, then he can pursue his wrongful termination in violation of public policy tort claim, and as stated above, unlike *Tomco*, there are multiple sources of the basis of the public policy at stake.

*Bickers v. W&S Life Insurance Co.*, 116 Ohio St.3d 351, 2007-Ohio-6751, 879 N.E. 2d 201, also cited by Appellant below is distinguishable. According to the reasoning of this Court in *Tomco*, unlike the situation in *Tomco* (and the instant case), the plaintiff in *Bickers* was discharged for **non-retaliatory** reasons while she was receiving workers’ compensation benefits. The employer did not discharge Bickers until years after she filed her claim. The issue in *Bickers* was “whether the tort of wrongful discharge in violation of public policy applies to a non-retaliatory discharge of an injured worker receiving worker’s compensation benefits” *Bickers* 116 Ohio St. 3d at ¶1; In *Bickers* this Court held that “[a]n employee who is terminated from employment while receiving workers’ compensation has no common-law cause of action for wrongful discharge in violation of the public policy underlying R.C. 4123.90, which provides the exclusive remedy for employees claiming termination in violation of rights conferred by the Workers’ Compensation Act.” *Id.* at syllabus. The claims of the Appellee in the instant case fall outside this holding because Appellee alleges a retaliatory rather than a non-retaliatory discharge. See *Tomco* at 159.

Likewise, at least one court since this Court's holding in *Leininger* has recognized wrongful discharge claims in violation of public policies in workplace safety situations such as the instant case. For example, in *Felts v. Ohio Dept. of Rehab & Corr.*, Ct. Claims No. 2007-03552, 2008-Ohio-4797, a corrections officer was allegedly harassed and disciplined for reporting violations of safety procedures involving inmates. The court held that he could not support a statutory claim for a whistleblower violation. However, the court held that his retaliation in violation of public policy claim could survive a motion to dismiss when based on the clear public policy in favor of workers reporting violations of policy resulting in placing workers in imminent danger of physical harm.

Even the Court recognized in *Carpenter v. Bishop Well Services Corp.* 5<sup>th</sup> Dist. Stark No. 2009CA00027, 2009-Ohio-6443 that the *Kulch* holding permits pursuit of a Whistleblower Statute claim and a wrongful termination in violation of public policy claim, but dismissed the authority and failed to follow it on the basis that it was a plurality decision. *Id.* at ¶29. Appellee respectfully requests that this Court evaluate the holding in *Carpenter* at least as to how it was applied by the trial court and court of appeals to the instant case, and because it was decided without the benefit of this Court's opinion in *Tomco, supra*. Even if Appellee cannot maintain both of his causes of action, which he believes is incorrect, the claims are pleaded in the alternative as permitted by Rule 8(A), Ohio Rules of Civil Procedure. Thus, should his Whistleblower Statute claim fail as a matter of law, he should nevertheless be permitted to proceed on the wrongful termination tort claim.

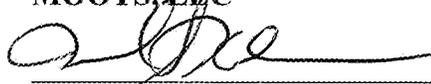
### **III. CONCLUSION**

Appellee/Cross-Appellant worked diligently at the Appellant/Cross-Appellee village's Waste Water Treatment Plant to try to eliminate problems of water pollution caused by the

village and by a local manufacturer. His efforts ruffled feathers resulting in retaliation and his ultimate unlawful termination. As the court of appeals found, the Appellant Village of Cardington was not entitled to summary judgment on the Ohio whistleblower statute claim. No matters of public or great general interest are raised by that decision and this Court should decline to accept jurisdiction on that part of the decision. On the other hand, Appellee/Cross-Appellant is entitled to reversal of the grant of summary judgment on his wrongful termination in violation of public policy claim. Appellee/Cross-Appellant respectfully requests that this Court accept jurisdiction on that claim only.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and accurate copy of the foregoing document has been served upon John D. Latchney, Tomino & Latchney, LLC, 803 East Washington Street, Suite 200, Medina, Ohio 44256, *Attorney for Defendant Village of Cardington*, via regular United States Mail, postage prepaid, this 27<sup>th</sup> day of September, 2013.



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